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No. 04-1196

IN THE

Supreme Court of the United States

William H. Kelley,

Petitioner,

v.

James V. Crosby, Jr.,
Secretary of the Florida Department of Corrections.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

MOTION AND BRIEF *AMICI CURIAE* OF THE HONORABLE JOHN J. GIBBONS, THE HONORABLE TIMOTHY K. LEWIS, THE HONORABLE WILLIAM S. SESSIONS, THOMAS P. SULLIVAN, THE FLORIDA INNOCENCE INITIATIVE, AND THE CENTER ON WRONGFUL CONVICTIONS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, The Honorable John J. Gibbons, the Honorable Timothy K. Lewis, the Honorable William H. Sessions, Thomas P. Sullivan, the Florida Innocence Initiative, and the Center on Wrongful Convictions move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has refused consent.

The individual *amici curiae* are former prosecutors, judges, and other public officials. The Honorable John J. Gibbons served as a judge of the United States Court of Appeals for the Third Circuit from 1970 to 1987, and as Chief Judge of that court from 1987 to 1990. The Honorable Timothy K. Lewis served as a judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999, and of the United States District Court for the Western District of Pennsylvania from 1991 to 1992. He also served as an Assistant District Attorney for Allegheny County, Pennsylvania from 1980 until 1983, and as an Assistant U.S. Attorney for the Western District of Pennsylvania from 1983 until 1991. The Honorable William S. Sessions served as a judge for the United States District Court for the Western District of Texas from 1974 to 1980, and as Chief Judge of that court from 1980 to 1987. He also served as Director of the Federal Bureau of Investigation from 1987 to 1993, and as U.S. Attorney for the Western District of Texas from 1971 to 1974. Thomas P. Sullivan served as the U.S. Attorney for the Northern District of Illinois from 1977 to 1981. He also served as Co-Chair of the Illinois Governor's Commission on Capital Punishment.

Amici Florida Innocence Initiative and the Northwestern University School of Law's Center on Wrongful Convictions are organizations devoted to identifying and rectifying erroneous convictions and other serious miscarriages of justice.

All *amici* thus have an ongoing interest in ensuring that prosecutors comply with the procedures constitutionally re-

quired to ensure the fairness and accuracy of the criminal trial – particularly when the death penalty is at stake. This interest derives in substantial part from *amici*'s recognition that the fair treatment of criminal defendants in capital litigation is essential to maintaining the integrity of, and public confidence in, the criminal justice system.

This brief focuses on petitioner's serious allegations of prosecutorial misconduct – specifically, the allegations that Assistant State Attorney Hardy Pickard suppressed evidence that would have impeached the credibility of John Sweet, on whose testimony the State's case, and thus petitioner's sentence of death, rested. The district court found, after a careful review of the record, that this wrongfully withheld evidence undermines confidence in the jury's verdict sufficiently to require vacating petitioner's conviction. *Amici* believe that the Eleventh Circuit's contrary ruling fails to account for the realities of criminal prosecutions and neglects the important public policies underlying a prosecutor's obligations under *Brady* v. *Maryland*. Moreover, allowing the decision below to stand would erode public confidence in the capital punishment system and increase the possibility of future wrongful convictions.

Absent this Court's intervention, there is the very significant prospect that an innocent man will be executed as a consequence of the prosecution's withholding evidence that the Constitution concededly required to be disclosed. The prejudice from that constitutional violation is further exacerbated, however, when one considers petitioner's additional claim that the performance of his trial counsel was constitutionally deficient.

Amici accordingly submit this brief to bring these matters to the Court's attention from the perspective of individuals and groups which, through their substantial experience, have unique insight into prosecutors' obligations under *Brady* and into the effect on juries and on confidence in the justice system that arises from the failure to disclose evidence encompassed by *Brady*.

Amici therefore should be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,

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BRIEF *AMICI CURIAE*

The Honorable John J. Gibbons, the Honorable Timothy K. Lewis, the Honorable William H. Sessions, Thomas P. Sullivan, the Florida Innocence Initiative, and the Center on Wrongful Convictions submit this *amici curiae* brief in support of petitioner William H. Kelley, Jr.[1] The interests of *amici* are set forth in the accompanying motion.

ARGUMENT

In this case, it is undisputed that the prosecution withheld *Brady* evidence that would have enabled petitioner's trial counsel to undermine substantially the credibility of essentially the prosecution's only witness, thereby causing the jury to discredit his testimony entirely. But the court of appeals deemed the constitutional violation immaterial because petitioner's counsel was able to impeach the witness in other ways, supposedly rendering any additional evidence merely "cumulative." This case presents an ideal vehicle to address this important and frequently recurring *Brady* issue that, as petitioner explains, see Pet. 16-19, has divided the courts of appeals: does the existence of *some* impeachment evidence relieve prosecutors of any constitutional duty to disclose other, available impeachment evidence? The lower courts are obviously in need of the substantial further guidance that can be provided by a ruling from this Court on the fully developed record in this case.

The decision of the court of appeals reverses the grant of a writ of habeas corpus in a capital case in which the conviction and sentence of death turned almost entirely on the credibility of that one witness. There was no physical evidence linking the defendant to the crime. Put another way, there is no doubt that the conviction and sentence must be vacated if

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[1] No person other than *amici* and their counsel participated in the writing of this brief or made a financial contribution to the brief. S. Ct. R. 37.6. The letter signifying petitioner's consent to the filing of this brief is on file with the Court.

this Court reverses the ironic view of the court of appeals that prosecutors have no *Brady* obligations with respect to evidence that guts the credibility of their central witness if that witness is already in sufficient disrepute.

I. Prosecutorial Misconduct Undermines Public Confidence In The Criminal Justice System And Contributes To Wrongful Convictions.

In 1940, Robert H. Jackson remarked that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous." Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940). Over six decades later, prosecutors continue to control critical points in the criminal justice system, exercising wide-ranging discretion at virtually every step from the decision to charge through sentencing. Perhaps most significantly, a prosecutor "generally commands resources vastly superior to those available to the defense attorney." Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 694 (1987).

While prosecutors wield significant control over the criminal justice system, they also are entrusted with a "special role * * * in the search for truth in criminal trials." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999). As this Court emphasized in the context of attorneys representing the United States, but in terms that apply equally to state and local prosecutors, the prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with

> earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. *United States*, 295 U.S. 78, 88 (1935).

Because of the special role and responsibilities with which he has been entrusted, a prosecutor's misconduct not only deprives the defendant of his right to a fair trial, but also has a harmful effect on the criminal justice system as a whole. This Court explained in *Brady* v. *Maryland* that:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. * * * A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice * * *.

373 U.S. 83, 87-88 (1963).

In capital cases, prosecutors exercise even more discretion – determining, for example, whether to bring capital charges and, if so, whether to offer a plea bargain in exchange for a lesser sentence. Because, as this Court has emphasized, "death is different," see *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976), a prosecutor's obligation to ensure a fair and accurate trial assumes even more importance. As a report by the Constitution Project's Death Penalty Initiative[2] explains:

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[2] The Death Penalty Initiative of the Constitution Project is a bipartisan committee of death penalty supporters and opponents – including former judges and prosecutors – who have proposed a series of reforms to reduce the risk of wrongful convictions.

> Society may feel justified in authorizing its representatives to skirt the line between playing the game rough and playing it fair when it comes to convicting those who are apparently guilty and making certain that they are confined and society is protected. Whether such practices are ever warranted, skirting the line with the potential of denying fair play cannot easily be justified when the issue is whether to execute rather than to imprison.

THE CONSTITUTION PROJECT, MANDATORY JUSTICE 48 (2001), *available at* http://www.constitutionproject.org/dpi/MandatoryJustice.pdf. And when a prosecutor withholds evidence in contravention of his obligation to ensure a fair trial, the "extreme nature and finality of death" mean that the consequences of the withholding are that much more severe, "creating the real risk that the truth will be hidden, and, as a result, increasing the likelihood of executing an innocent person." *Ibid.*

The suppression of evidence at issue in this case is unfortunately not uncommon in capital cases. A study of capital cases over more than two decades, commissioned by the Senate Judiciary Committee, concluded that prosecutorial suppression of evidence was the second-most common cause of error resulting in reversal – surpassed only by ineffective defense counsel (which the district court also found to warrant habeas relief in petitioner's case, see Pet. App. 117a). See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at i, ii, 5 (2000) [LIEBMAN, A BROKEN SYSTEM], *available at* http://ccjr.policy.net/proactive/newroom/release.vtml?id=1800. Moreover, that study observed, the "failure of police and prosecutors to disclose evidence before trial is one of the main reasons post-trial litigation over the reliability of capital verdicts takes so long * * *." JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PT. II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 411 (2002), *available at*

http://ccjr.policy.net/proative/newroom/release.vtml?id=26641.

The effect of the prosecution's misconduct is particularly pernicious in this case because it took the form of suppressing evidence that would have substantially undermined the credibility of the State's key witness. This scenario too regularly recurs in capital cases: a study of ninety-seven death row inmates who were wrongfully convicted between 1972 and 2002 concluded that the combination of misconduct by law enforcement officials and false testimony by "snitches" or other witnesses with incentives to curry favor with prosecutors was a major factor in those wrongful convictions. See Rob Warden, *The Snitch System* (Apr. 25, 2002), *available at* http://www.law.northwestern.edu/depts/clinic/wrongful/Causes/Snitch.htm.

The lengthy delays, high error rates, and numerous examples of wrongful convictions in capital cases erode "[p]ublic faith in the courts and the criminal justice system * * *." LIEBMAN, A BROKEN SYSTEM, *supra*, at 19. No matter whether one supports or opposes the death penalty as a matter of conscience, there must be broad agreement that the penalty should only be administered after trials that are reliable and free of constitutional error.

As *amici* now explain, this capital case presents the substantial prospect that the prosecutor abused the special trust reposed in him, with the deeply troubling consequence that a man who may be innocent will be executed. This result would in turn lead to the broader consequence that public confidence in the administration of the death penalty will be further undermined and, in all likelihood, that more capital defendants will be wrongfully convicted.

II. Certiorari Is Warranted In This Case Because Prosecutors Suppressed Impeachment Evidence, In Violation Of *Brady*.

This Court has held that "[t]here are three components of a true *Brady* violation: The evidence at issue must be favor-

able to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler* v. *Greene*, 527 U.S. 263, 281-82 (1999). The first two criteria are unquestionably met here; only the third is genuinely disputed.

The State suppressed three documents – a Massachusetts court order, an investigative report prepared by a Florida law enforcement officer, and a trial transcript – that would have provided petitioner's trial counsel with substantial material to impeach the testimony of the State's star (indeed, essentially only) witness, John Sweet. The first two documents would have demonstrated a link between Sweet's testimony in petitioner's case and his deal for immunity from a long list of charges in Massachusetts, such that Sweet had an incentive to testify falsely; the third document would have revealed that, prior to his own trial for Maxcy's murder, Sweet had responded to his girlfriend's suggestion that he frame petitioner by admitting that he did not know him.

The court of appeals concluded, however, that the suppressed evidence was not material because petitioner's counsel was able to impeach Sweet's testimony to a lesser extent by "effectively capitaliz[ing]" on the arguments that the documents supported, thereby rendering the documents themselves merely cumulative. Pet. App. 82a, 99a. That holding is not only legally erroneous and in conflict with rulings of other circuits, but also perversely creates an incentive for prosecutors to withhold crucial evidence in precisely the kinds of cases, such as petitioner's, in which it is most likely to make a difference.

A. Prosecutors Withheld Key Impeachment Evidence from Petitioner.

The centerpiece of the State's case against petitioner was the testimony of John Sweet, who had himself twice been tried on first-degree murder charges in connection with Maxcy's 1966 murder. Pet. App. 121a. The first trial ended

in a hung jury, *ibid.*, while the second trial ended in a guilty verdict that was later reversed on appeal – ironically, because of the trial judge's failure to admit testimony that undermined the credibility of Irene Maxcy, Sweet's paramour and the State's star witness against Sweet. *Id.* 121a-122a. Sweet testified on his own behalf in both trials and denied any involvement in Maxcy's murder. *Id.* 121a.

In 1981, Sweet was "facing criminal charges in Massachusetts of prostitution, narcotics distribution, arson, bribery, counterfeiting, loan sharking, and hijacking. With authorities closing in on him Sweet went to them first." Pet. App. 122a. While in "protective custody" in Massachusetts, Sweet met with Florida law enforcement officials and implicated petitioner in Maxcy's murder. *Ibid.* The very next day, Sweet was awarded immunity for the charges that he faced in Massachusetts. *Ibid.* As the district court would later find in evaluating petitioner's *Brady* claim, the timing was no coincidence. Rather, Sweet's immunity in Massachusetts was directly related to his cooperation with Florida officials.

Petitioner was indicted on first-degree murder charges in December 1981. Pet. App. 122a. Despite petitioner's repeated requests, the prosecution failed to turn over several key pieces of evidence, including "evidence of Sweet's true immunity deal, the transcript of John Sweet's first trial, a police report which recorded [a witness's] inability to positively identify a picture of [petitioner] shortly after the murder, and a latent fingerprint report." *Id.* 129a. Sweet's testimony was the "primary evidence against" petitioner, *id.* 123a, as the government had itself authorized the destruction of most of the physical evidence collected at the crime scene long before petitioner was even indicted. *Id.* 122a. Sweet testified that he had paid an associate, Walter Bennett, to arrange Maxcy's murder, and that Bennett had in turn hired petitioner and another man to kill Maxcy. See *id.* 5a. Sweet also acknowledged that he "had received immunity in Massachusetts for a number of crimes" and – on cross-examination – that he had "received immunity in Florida for the Maxcy case and for the

perjury committed in his first two trials." *Id.* 183a. Petitioner's first trial ended in a hung jury. *Id.* 122a.

At the second trial, during his closing statement, Assistant State Attorney Hardy Pickard directly addressed the issue of Sweet's immunity and, thus, his credibility. Pickard told the jury that

> John Sweet got immunity from Massachusetts on a long list of things. It has nothing to do with the Maxcy case or giving them Kelley on the Florida cases. He already had his immunity from Massachusetts on loan sharking, whatever that long list of things were. He didn't have to give them Kelley to get immunity.

Pet. App. 70a n.37. That false statement by the prosecutor – which the defense could not challenge because the prosecution had flouted its constitutional obligation to disclose material evidence under *Brady* – would prove critical. Seven hours after the jury began its deliberations, it sent the trial court a note indicating that it had voted three times and was at an "impasse." *Id.* 184a. The jury continued its deliberations and subsequently sent the trial court a question:

> As the Jury, we would like to know if John J. Sweet received immunity in Florida for the first-degree murder and perjury before he gave information on the Maxcy trial, and if he had anything to gain by his testimony.

Id. 130a-131a. Heeding Pickard's urging that it not read the testimony back to the jury, *id.* 131a, the court instructed the jury that although the court could not "comment on the evidence," the jury "ha[d] the right to request that certain portions of the testimony be read back" to it, *id.* 184a-185a. The jury resumed its deliberations, returned a verdict of guilty without making any further requests, *id.* 185a, and recommended that petitioner be sentenced to death, *id.* 123a.

During his state post-conviction proceedings, petitioner uncovered the prosecution's gross *Brady* violations. Peti-

tioner's request for prosecution and investigative files, made pursuant to the Florida Public Records Act, yielded a series of documents that – despite petitioner's repeated pretrial requests – had not previously been provided to him. Several of these documents would have provided petitioner's trial counsel with substantial ammunition with which to impeach the testimony of Sweet, the State's star witness.

1. Evidence Regarding Sweet's Immunity Deal

One of the items that the prosecution failed to turn over to petitioner's trial counsel was the so-called "Mitchell report," an investigative report prepared by Florida Department of Law Enforcement Special Agent Joe Mitchell that detailed Florida's cooperation with the Massachusetts authorities in interviewing Sweet and negotiating his immunity deals. The report relates Agent Mitchell's February 21, 1981 conversation with the director of a Regional Organized Crime Center in which Mitchell learns that Sweet was in protective custody in Massachusetts and "had advised that he had been responsible for hiring Kelley in connection with the VON MAXCY murder in Sebring, Florida, during the year 1966." The report expressly indicates "that Sweet was willing to testify in behalf of the State of Florida, provided he could be granted immunity, in the 1966 case," Pet. App. 130a, and that the Massachusetts police were "requesting assistance from the Florida Department of Law Enforcement in checking into the investigation of the homicide of Von Maxcy," *id.* 73a.

On March 6, 1981, Mr. Pickard and other law enforcement officials from both Florida and Massachusetts met with Sweet's attorney in Florida "to discuss actions to be taken in conjunction with the information provided by John Sweet, and the request by the Massachusetts authorities." Six days later, Mr. Pickard and other Florida officials conducted a "detailed interview" with Sweet in a Massachusetts district attorney's office in which Sweet admitted to paying Walter Bennett to arrange Maxcy's murder and claimed that petitioner was one of the hitmen hired by Bennett. Pet. App. 74a, 74a-

75a n.41. Moreover, although the Florida officials had presumably traveled to Massachusetts to learn about Sweet's involvement in the Maxcy case, the interview also included the prospect that Sweet would assist in the investigation and prosecution of Massachusetts cases as well: "Mr. Sweet emphasized that he * * * was agreeable to provide information pertaining to Kelley's current activities and also had agreed to testify against him." *Id.* 76a n.41. Sweet then reiterated that "he was agreeable to testify for the State of Florida, in connection with the * * * Maxcy homicide." *Ibid.*

The Mitchell report ends by noting that after reviewing the Maxcy case, Mr. Pickard and other Florida officials had identified "several areas of potential problems which may or may not exist which could affect a successful prosecution of William Kelley by the State of Florida." First and foremost among these "potential problems" is that "[t]he testimony of John Sweet * * * would be in conflict with testimony he provided in 1967 * * * which would automatically place his testimony in the impeachable category." Pet. 17 n.8.

The prosecution also did not provide petitioner with a copy of a Massachusetts state court order that expressly granted Sweet immunity in Massachusetts. Significantly, the order is dated March 13, 1981, *one day* after Sweet met with Florida officials and offered to testify regarding the Maxcy case and various Massachusetts crimes. Pet. App. 130a.[3]

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[3] The Eleventh Circuit's efforts to demonstrate that the order was not *Brady* material because it "was a public document and thus available to Kelley's defense team," Pet. App. 71a n.39, are unavailing: this Court has never recognized any "public records" exception to a prosecutor's *Brady* obligations, and, indeed, other courts have affirmatively rejected such an exception. See, *e.g.*, *Chavis* v. *North Carolina*, 637 F.2d 213, 225 (CA4 1980). And in any event, information concerning Sweet's immunity deal should be imputed to Pickard because of the close cooperation between Massachusetts and Florida authorities. See *United States* v. *Antone*, 603 F.2d 566, 570 (CA5 1979) (imputing knowledge of false testi-

Taken together, the Mitchell report and the immunity order would have provided petitioner's trial counsel with powerful ammunition with which to undermine Sweet's credibility. First, the information contained in the Mitchell report would have been directly responsive to the question sent to the trial court by the jury – viz., whether "Sweet received immunity in Florida for the first degree murder and perjury before he gave information on the Maxcy trial." Pet. App. 130a. The answer to that question is that, as the Mitchell report indicates, Sweet was willing to testify only "provided he could be granted immunity in the" Maxcy case. *Ibid.* Moreover, that the jury posed such a question strongly suggests both that Sweet's immunity deals played a crucial role in its deliberations and that it harbored doubts about Sweet's motivations for testifying – doubts that the suppressed evidence would have further reinforced.

Second, the report and immunity order render highly suspect Hardy Pickard's closing argument to the jury, in which he stated that Sweet "didn't have to give [Massachusetts officials] Kelley to get immunity" because he "already had his immunity" from that state. Pet. App. 70a n.37. Pickard's statement is belied by the timing of events related to his immunity deal: the immunity order indicates that Sweet did not receive immunity in Massachusetts until the day after he implicated petitioner in the Florida case. *Id.* 130a.

Third, as the district court found, the two documents "proved Sweet had a deal for immunity on numerous serious felonies in Massachusetts which were inextricably connected to Sweet's implication of Kelley in the murder of Maxcy." Pet. App. 129a-130a. Not only is this finding by the district court is entitled to deference, but it is in fact corroborated by

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mony to federal prosecutors in light of "extensive cooperation" between federal and state investigators). Finally, even if petitioner's trial counsel had obtained a copy of the immunity order, that order would have been significant only when considered in conjunction with the Mitchell report, which was also withheld from petitioner.

Pickard himself, who testified at petitioner's federal evidentiary hearing that – contrary to his representations to the jury – he was "sure" that Sweet "ha[d] something to gain in Massachusetts" by testifying against petitioner in Florida.[4] Pet. 11. But, in any event, "the manner in which both states worked together to secure Sweet's cooperation," Pet. App. 132a, and the fact that the immunity order was issued immediately after the March 12, 1981 meeting described in the Mitchell report, see *id.* 182a, would have created the strong inference that Sweet's Massachusetts immunity deal depended on his cooperation with Florida officials, such that he indeed "had [something] to gain by his testimony": a powerful incentive to testify falsely to curry favor with the Massachusetts officials responsible for his immunity there.

2. The First Trial Transcript

Prior to his trial, petitioner requested that the prosecution provide him with a copy of the transcript from Sweet's first trial in 1967. Pet. App. 132a, 186a. Although Mr. Pickard responded with a letter indicating that he was "unaware of the status" of the transcript and suggesting that petitioner obtain a copy from the court reporter, the State subsequently acknowledged that it actually had a copy of the transcript in its files all along. *Id.* 186a. Because the court reporter was unable to assist him, petitioner did not receive a copy of the transcript until his state post-conviction proceedings, when he obtained the transcript as part of his Public Records Act request. *Ibid.*

The transcript "contained almost three hundred pages of Sweet's testimony," which, the district court found as a matter of fact, "would have been valuable in impeaching" him. Pet. App. 132a. First, the transcript contained testimony regarding several tape-recorded telephone conversations be-

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[4] An attorney who had represented Sweet in his Massachusetts immunity proceedings also testified at the federal evidentiary hearing that Sweet's immunity hinged on "provid[ing] the information that the law enforcement officials from Massachusetts and Florida were looking for." See Pet. 10-11.

tween Sweet and Irene Maxcy. *Id.* 133a. During his first trial, Sweet testified that he believed Irene Maxcy's assurances that her telephone was not being bugged. *Ibid.* In these conversations, Irene Maxcy "begged Sweet to work a deal with the police by framing someone in" her husband's murders. *Ibid.* Although she suggested "William Kelley" as someone whom Sweet could frame, Sweet responded that he did not know a "William Kelley." *Ibid.* At his own second trial, Sweet testified, however, that he had in fact known that Irene Maxcy's telephone was bugged, and he testified at petitioner's trial "that he lied to the police and others about knowing" petitioner. *Id.* 187a. As the district court found as a matter of fact, access to the first trial transcript "could reasonably have changed the outcome of [petitioner's] trial," *id.* 133a, because these discrepancies in Sweet's testimony could have been used to seriously undermine his credibility. In particular, notwithstanding Sweet's later testimony that he had lied about not knowing petitioner, the jury could have determined that Sweet's original version of events was at least as credible as the version that he offered at petitioner's trial.

Second, Sweet testified at length during his first trial regarding Irene Maxcy's allegedly deviant sexual conduct. Pet. App. 132a. By contrast, in his testimony at petitioner's trial, Sweet professed his love for Mrs. Maxcy. If presented with Sweet's testimony from his first trial, the jury would, as the district court notes, "have thought carefully about the credibility of a man who made such allegations about a woman he claimed to love." *Ibid.* And more generally, the first trial transcript would have demonstrated the specific lengths to which Sweet was willing to perjure himself to stay out of prison and would thereby have provided petitioner with additional ammunition with which to fully impeach Sweet.[5]

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[5] Although the Eleventh Circuit deemed this portion of Sweet's testimony immaterial "because the Florida Supreme Court * * * concluded that evidence of [Irene Maxcy's] alleged deviancy would not have been admissible at [petitioner's] trial," Pet. App. 83a-84a,

3. Other Evidence[6]

In addition to the three documents discussed above, prosecutors also withheld other exculpatory evidence. For example, although petitioner's counsel argued to the jury that none of the fingerprints taken at the crime scene had been identified as petitioner's, prosecutors withheld a report that compared fingerprints taken at the scene and from the victim's car and which expressly found that none of the prints taken at the scene matched petitioner's. As the district court explained, "commenting that [petitioner's] fingerprints were nowhere to be found in the criminal investigation is not the same as being able to present a report to the jury stating such an absence of [petitioner's] prints." Pet. App. 136a.

Prosecutors also failed to provide petitioner's trial counsel with a police report regarding the identification of petitioner by a clerk at the motel where petitioner allegedly stayed during his trip to Florida to commit the crime. Pet. App. 134a. Although petitioner's trial counsel was provided with a similar report, and although both reports contained descriptions of a "William Kelley" that do not resemble petitioner, the discrepancies between petitioner's appearance and the description in the undisclosed report are even more marked than the discrepancies in the disclosed report. *Ibid.* Addressing the withheld report, the district court found that "if defense counsel had been in possession of the undisclosed police report, counsel would have been in a better position to

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such evidence "need not have been independently admissible to have been material. Evidence is material if it might have been used to impeach a government witness, because 'if disclosed and used effectively, it may make the difference between conviction and acquittal.'" *Carriger* v. *Stewart*, 132 F.3d 463, 481 (CA9 1997) (en banc) (quoting *United States* v. *Bagley*, 473 U.S. 667, 676 (1985)).

[6] Although petitioner does not discuss this additional evidence in the limited space available to him, the court of appeals addressed it, and *amici* believe that it is encompassed within the *Brady* claim.

cross-examine [the clerk] concerning the actual negative photographic identification, something far more exculpatory than the information contained in the disclosed report." *Id.* 135a.

B. The Suppressed Evidence Undermines Confidence in the Jury's Verdict.

Despite the State's unquestioned duty to disclose all of this suppressed evidence, the court of appeals found no constitutional violation because it disagreed with the district court's conclusion that there was "a 'reasonable probability that * * * the result of the proceeding would have been different.'" Pet. App. 99a (quoting *Bagley*, 473 U.S. at 682). The Eleventh Circuit's conclusion that petitioner's trial counsel "effectively capitalized * * * on every potentially valuable argument" that the evidence supported, *ibid.*, deems immaterial both the extraordinarily close nature of petitioner's case and the extent to which the State's case depended on Sweet's testimony implicating petitioner, which preclude dismissing the suppressed evidence as "cumulative." Rather, this Court's own precedents lead to the inevitable conclusion that as a result of the prosecution's suppression of the evidence, the verdict in this case is not "worthy of confidence," *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995), and that the decision below reinstating petitioner's death sentence despite substantial evidence that petitioner is actually innocent should therefore be reversed. Because this case represents a recurring factual scenario in criminal prosecutions, this Court's intervention is all the more required.

This Court has made clear that a defendant's constitutional rights are violated when the government fails to disclose evidence that is material – that is, when there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles*, 514 U.S. at 433-34 (quoting *Bagley*, 473 U.S. at 682 (Blackmun, J.)). Put another way:

> The question is not whether the defendant would more likely than not have received a different verdict

> with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. at 434 (quoting *Bagley*, 473 U.S. at 678).

This Court has further instructed that in determining whether the suppressed evidence is material, it should be "considered collectively, not item by item." *Kyles*, 514 U.S. at 436. Significantly, this Court has explained that the nature of the case – that is, whether the case is a close one – is also a factor to consider in determining whether the suppressed evidence is material: "[i]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *United States* v. *Agurs*, 427 U.S. 97, 113 (1976).

Finally, this Court has long recognized the pivotal role that witnesses (and their credibility) play in criminal proceedings. In *Napue* v. *Illinois*, this Court explained that

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

360 U.S. 264, 269 (1959). In particular, this Court has held that evidence of immunity agreements is especially important to a witness's credibility, and its suppression thus likely to prejudice the trial's result. See *Giglio* v. *United States*, 405 U.S. 150, 154-55 (1972) (when government's case "depended almost entirely on" one witness, his credibility "was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it").

Petitioner's case is a singularly close one: the conviction and sentence of death hung by the slender thread of Sweet's testimony, and hence his credibility. Petitioner's first trial ended in a hung jury and a mistrial. See Pet. App. 122a. And although his second trial ended in petitioner's conviction, it did so only after the jury had notified the court that it had voted three times and was at an "impasse." *Id.* 184a. Even the Florida Supreme Court – in rejecting petitioner's direct appeal – took pains to "emphasize * * * that if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." *Id.* 169a. Thus, in the experience of *amici*, petitioner's case is at the very least the kind of case described by this Court in *Agurs* – one in which "additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 427 U.S. at 113.

The close nature of petitioner's case assumes even greater significance, however, because the State's case against petitioner depended so heavily on one individual's credibility. As the Florida Supreme Court acknowledged on direct appeal, the State had "insufficient evidence to proceed against [petitioner] until Sweet offered his testimony in 1981." Pet. App. 169a. Not surprisingly, Sweet's testimony and credibility were the subject of considerable interest for jurors in both of petitioner's trials. During petitioner's first trial, the jury – which had already informed the court that it was at an "impasse" – requested "that Sweet's entire testimony be read again" and, after hearing the testimony, announced that it was unable to reach a verdict. *Id.* 184a.

As reflected in their note requesting additional information regarding Sweet's immunity deal, jurors at petitioner's second trial were equally concerned about Sweet's credibility. As the district court found, "[c]learly, the jury was vitally interested in Sweet's motivation for testifying as he did. If Sweet had nothing to gain from his testimony, his testimony would be more credible. On the other hand, if Sweet did have anything to gain by his testimony, his testimony would be

more suspect." Pet. App. 131a. It is plain from the record that the suppressed evidence was precisely the kind of evidence that could have eroded Sweet's credibility with the jury. That Sweet had previously stated that he did not know petitioner; that his girlfriend had suggested to him that he frame petitioner; and that he first informed Florida authorities of his belief that petitioner had committed the crime right before he negotiated a global deal with Massachusetts and Florida authorities: this is exactly the kind of powerful evidence that could have swayed the jury to disregard his newfound, suspect, and convenient testimony. In other words, the State's suppression of evidence "undermines confidence" in the outcome of petitioner's trial and requires reversal.

C. The Decision Below Also Inverts the Constitutionally Prescribed Incentives for Prosecutors to Disclose Exculpatory Evidence.

Amici submit that certiorari is further warranted in this case because the Eleventh Circuit has prescribed a constitutional rule that is directly contrary to this Court's admonition that "a prosecutor anxious about tacking too close to the wind * * * [should] disclose a favorable piece of evidence," *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995). Specifically, by holding that the prosecution's suppression of impeachment evidence was not material because petitioner's counsel had some other evidence with which to discredit the State's star witness, the decision below gives prosecutors a perverse incentive to withhold the very evidence that would be most likely to make a difference in a close case – viz., evidence that may result in the jury's discrediting a key witness's testimony entirely and therefore acquitting the defendant. If such evidence is on the other hand withheld, and the jury credits the witness's testimony even though the witness has been impeached, defendants may be wrongfully convicted. Such a scenario is not merely hypothetical; rather, courts are frequently confronted with *Brady* claims arising from suppressed impeachment evi-

dence that is purportedly only "cumulative" of other impeachment evidence available to the defendant.[7]

III. The Assistant State Attorney Who Prosecuted Petitioner Has A History Of Misconduct In Capital Cases.

Although the prosecution's suppression of evidence would be troubling in any case, let alone a capital case, it is particularly disturbing that petitioner's case is not the only capital case in which Hardy Pickard has been engaged in substantial and pervasive misconduct. Rather, as the district court observed, Mr. Pickard "has a habit of failing to turn over exculpatory and impeachment evidence" in capital cases.

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[7] Recent examples of such cases include, *e.g.*, *Jamison* v. *Collins*, 100 F. Supp. 2d 647, 692-95 (S.D. Ohio 2000) (notwithstanding argument that defense counsel had "thoroughly impeached" key witness, suppressed evidence not merely cumulative because it "would have told * * * defense counsel more than they already knew"; "when compared to the [prosecution's] relatively weak case * * *, the collective effect of the suppressed evidence in this case undermines our confidence in [the] conviction and sentence"), aff'd, 291 F.3d 380 (CA6 2002); *Benn* v. *Lambert*, 283 F.3d 1040, 1056 (CA9 2002) (suppressed evidence material when "there is reason to believe that the jury relied on a witness's testimony to reach its verdict despite the introduction of impeachment evidence at trial, and there is a reasonable probability that the suppressed impeachment evidence, when considered together with the disclosed impeachment evidence, would have affected the jury's assessment of the witness's credibility"); *Moreno-Morales* v. *United States*, 334 F.3d 140, 147-48 (CA1 2003) (suppressed evidence that would have impeached two key witnesses by illustrating additional inconsistent testimony "merely cumulative" when defense "had numerous other examples of contradictory statements made by both witnesses"); *Burton* v. *Dormire*, 295 F.3d 839, 847 (CA8 2002) (no *Brady* violation stemming from alleged withholding of information regarding key witness's second plea agreement when jury was aware of initial plea agreement, as such "[e]vidence * * * is purely cumulative for impeachment purposes").

Pet. App. 129a & n.3. In *State* v. *Melendez* (No. CF-84-1016A2-XX) (10th Jud. Cir. Dec. 2001), *available at* http://www.oranous.com/innocence/JuanMelendez/melendezorder.htm, a Florida court vacated the defendant's conviction and death sentence and ordered a new trial in light of, inter alia, Mr. Pickard's withholding of *Brady* evidence. Mr. Melendez was later released from prison after the State declined to re-try him. See Phil Long & Amy Driscoll, *Inmate On Death Row Goes Free After 17 Years*, MIAMI HERALD, Jan. 4, 2002, at 1A.

The parallels between Mr. Melendez's case and petitioner's are striking. As in petitioner's case, there "was no physical evidence implicating the Defendant in the murder"; rather, Mr. Melendez's "conviction rested primarily on the testimony of two key State witnesses." *State* v. *Melendez* (No. CF-84-1016A2-XX) (10th Jud. Cir. Dec. 2001), *available at* http://www.oranous.com/innocence/JuanMelendez/melendezorder.htm. In a motion for post-conviction relief, Mr. Melendez presented evidence that Mr. Pickard had withheld a variety of evidence from defense counsel. Emphasizing that both Mr. Pickard and Mr. Melendez's defense counsel had "recognized the critical importance of [the key witnesses'] credibility" in their closing arguments, the circuit court held that "[t]he Brady evidence withheld by the prosecution * * * seriously undermines the credibility of the two key State witnesses who testified at trial." She concluded: "Viewed in its totality, this suppressed evidence calls into question [the witnesses'] testimony to the degree that it undermines confidence in the Defendant's conviction and death sentence." *Ibid.*

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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